

Massachusetts Rules of Professional Conduct – Committee Proposal – Marked for changes from the current Massachusetts rule

~~RULE 8.5 DISCIPLINARY AUTHORITY~~

Maintaining The Integrity Of The Profession Rule 8.5 Disciplinary Authority; Choice Of Law

(a) *Disciplinary Authority.* A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.

A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction ~~where the lawyer is admitted~~ for the same conduct.

~~(b) [RESERVED].~~

(b) *Choice of Law.* In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.

(2) For any other conduct, the rules of the jurisdiction in which the lawyer maintains his or her principal office shall apply; provided, however, if the lawyer's principal office is in this jurisdiction, the lawyer's conduct does not implicate a significant interest of this jurisdiction, and the predominant effect of the lawyer's conduct is clearly in another jurisdiction, then the rules of that other jurisdiction shall apply. A lawyer shall not be subject to discipline if the lawyer acts in accordance with a reasonable application of the foregoing principles.

Comment

Disciplinary Authority

~~[1] — Paragraph (a) restates longstanding law.~~

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction.

[1A] In adopting Rule 5.5, Massachusetts has made it clear that out-of-state lawyers who engage in practice in this jurisdiction are subject to the disciplinary authority of this state. A great many states have rules that are similar to, or identical with, Rule 5.5, and Massachusetts lawyers therefore need to be aware that they may become subject to the disciplinary rules of another state in certain circumstances. Rule 8.5 deals with the related question of the conflict of law rules that are to be applied when a lawyer's conduct affects multiple jurisdictions. Comments 2-7 state the particular principles that apply.

[1B] There is no completely satisfactory solution to the choice of law question so long as different states have different rules of professional responsibility. When a lawyer's conduct has its impact in another jurisdiction, that jurisdiction may assert that its law of professional responsibility should govern, whether the lawyer was physically present in the jurisdiction or not.

Choice of Law

[2] — Rule 8.5(b) has been reserved because study of ABA Model Rule 8.5(b) has revealed many instances in which its application seems problematic.

[3] — Reserved.

[4] — Reserved.

[5] — Reserved.

[6] — Reserved.

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, paragraph (b) provides that any particular act of a lawyer shall be subject to only one set of rules of professional conduct, makes the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of the appropriate regulatory interests of relevant jurisdictions, and provides protection from discipline for lawyers who act reasonably in the face of

uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise.

[4A] As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, the choice of law is governed by paragraph (b)(2). Paragraph (b)(2) creates a "default" choice of the rules of the jurisdiction in which the lawyer's principal office is located. There are several reasons for identifying such a default rule. First, the jurisdiction where the lawyer principally practices has a clear regulatory interest in the conduct of such lawyer, even in situations where the lawyer's conduct affects other jurisdictions. Second, lawyers are likely to be more familiar with the rules of the jurisdiction where they principally practice. Indeed, most lawyers will be licensed in the office where they principally practice and familiarity with a jurisdiction's ethical rules is commonly made a condition of licensure. Third, in many situations, a representation will affect many jurisdictions, such as a transaction among multiple parties who reside in different jurisdictions involving performance in yet other jurisdictions. The selection of any of the jurisdictions that are affected by the representation will often be problematic. Where no jurisdiction has an interest in regulating the lawyer's conduct that is clearly superior to the default jurisdiction's, the choice of the latter will reduce complexity and indeterminacy in identifying the pertinent rule of conduct.

[4B] There will be some circumstances, however, where a jurisdiction other than the jurisdiction in which the lawyer maintains his or her principal office will have a clearly more significant interest in regulating the lawyer's conduct. Accordingly, the proviso of the first sentence of paragraph (b)(2) provides that when the predominant effect of the lawyer's conduct is in a jurisdiction other than this jurisdiction, the ethical rules of such other jurisdiction apply to such conduct unless the lawyer's conduct implicates a significant interest of this jurisdiction. If this jurisdiction has a significant interest in the lawyer's conduct, even if the predominant effect of the conduct may be in another jurisdiction, this rule still would apply the Massachusetts rules to the lawyer's conduct if the lawyer's principal office is in Massachusetts.

[5] The application of these rules will often involve the exercise of judgment in situations in which reasonable people may disagree. So long as the lawyer's conduct reflects an objectively reasonable application of the choice of law principles set forth in paragraph (b), the lawyer shall not be subject to discipline under this Rule.

[6] If this jurisdiction and another jurisdiction were to proceed against a lawyer for the same conduct, they should identify and apply the same governing ethics rules. Disciplinary authorities in this jurisdiction should take all appropriate steps to see that they do apply the same rule to the same conduct as authorities in other jurisdictions, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. Moreover, no lawyer should be subject to discipline in this jurisdiction for violating the regulations governing advertising or solicitation of a non-U.S. jurisdiction where the conduct would be constitutionally protected if performed in this jurisdiction.

BOS111 12099714.14